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NO. 87-6984

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MICHAEL E. SHARP,

Petitioner,

v.

STATE OF TEXAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

1. Whether the State may constitutionally use inflammatory, unreliable, and irrelevant testimony, obtained through secret in-custodial interrogations, as evidence of future dangerousness in the sentencing phase of a capital murder trial.

2. Whether the admission of evidence seized subsequent to arrest violates Fourth Amendment rights, in the absence of probable cause for arrest, inasmuch as the affidavit of the investigating officer upon which the arrest warrant was issued contained only the words "my investigation" as a basis for the arrest.

3. Whether, under the United States Constitution, the indictment must be read to the jury and the not guilty plea stated to the jury, prior to the taking of the testimony in the guilt/innocence phase of a capital murder trial.

4. Whether the admission of evidence seized subsequent to a warrantless search of a vehicle violates Fourth Amendment rights, in the absence of evidence that the consent to search the vehicle was given by a person with common authority over the vehicle.

5. Whether, as applied, the first and second statutory sentencing questions in the Texas capital sentencing procedure satisfy the constitutional requirements articulated by this Court in cases decided since Jurek v. Texas.

LIST OF PARTIES

The parties to the proceedings below and in this Court are Petitioner, Michael E. Sharp, and Respondent, the State of Texas.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Michael E. Sharp (the "petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (the "court of appeals") is attached hereto as Appendix A. The court of appeals' Order temporarily withdrawing its mandate is attached hereto as Appendix B.

JURISDICTION

The court of appeals affirmed petitioner's conviction for capital murder and his sentence of death on April 9, 1986. A Motion seeking leave to file for rehearing was denied on September 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Petitioner respectfully requests the Court's waiver of the time requirement for the filing of this petition. Petitioner is indigent and was not represented by counsel after his representation by court appointed counsel in the trial court and in the court of appeals. The undersigned, pro bono counsel, agreed in late 1987, as part of a new Texas program, to represent petitioner in his future post-conviction appeals. The Affidavit of the undersigned counsel of record for petitioner that accompanied the Emergency Application filed with the court of appeals and that resulted in that court's Order temporarily withdrawing its mandate is attached as Appendix C and should be considered by the Court in considering whether to waive its time requirement for the filing of this petition.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The text of these Amendments appears in Appendix D. The case also involves Art. 37.071 of the Texas Code of Criminal Procedure. The text of this statute appears in Appendix E.

STATEMENT OF THE CASE

1. THE CASE. On May 19, 1983, petitioner was convicted by a Texas jury of the June 11, 1982 capital murder of Brenda Kay Broadway and sentenced to death. Petitioner filed a Motion for New Trial and timely amended it. The Motion, as amended, was not granted by the trial court. The conviction and sentence were then appealed to the court of appeals.

The court of appeals affirmed the conviction and sentence. A Motion seeking leave to file for rehearing was denied. The first execution date was set by the trial court for March 24, 1988. The mandate was temporarily withdrawn and the execution was stayed by the court of appeals' Order of March 15, 1988.

2. HOW THE ISSUES WERE RAISED AND DECIDED BELOW.

a. Inclusion of highly inflammatory, unreliable, irrelevant and illegally obtained testimony.

In the sentencing phase of a capital murder trial in Texas, one of the questions asked of the jury is whether there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Art. 37.071(b)(2) Tex. Code Crim. Proc. The trial court permitted the State to present testimony during the sentencing phase that the petitioner had identified the location of the body of Blanca Arreola, a missing Odessa, Texas woman, for Detective Jerry Smith of the Odessa Police Department. Detective Smith did not testify to any crime or violence committed by the petitioner in connection with the disappearance or death of Blanca Arreola.

Defense counsel for petitioner had earlier requested evidence of any such oral statements by petitioner to any investigating or law enforcement officers with a Motion For Discovery and Inspection of Evidence that was considered at a pretrial hearing and granted by the trial court. (TR 1-5 to 17) The prosecutor represented at that hearing that there were no such statements. (TR Pretrial-2 to 5) The petitioner filed a Motion in Limine prior to trial seeking to exclude such oral statements. It was denied by the trial court. (TR 1-70 to 75) When the testimony was tendered, defense counsel objected and later moved to strike it. The trial court admitted the testimony.

After the trial was over and he had been sentenced to death, the petitioner timely filed a Motion For New Trial, as amended, with the trial court stating that the trial court erred in admitting this testimony since it revealed no evidence of misconduct and was offered merely to prejudice and inflame the minds of the jurors. (TR 1-116 to 122) A new trial was not granted. The court of appeals stated that defense counsel had made a proper objection to the admissibility of this testimony, but affirmed the presentation of this testimony to the jury during the sentencing phase as admissible evidence of unadjudicated offenses. Sharp v. State of Texas, 707 S.W.2d 611, 618-619 (Tex.Crim.App. 1986) (hereinafter referred to as "Sharp at ___").

Detective Smith also testified that he had obtained these statements from the petitioner during several visits while petitioner was in jail awaiting this trial. (TR IV-559) Detective Smith knew that petitioner was represented by counsel, but did not approach or obtain the permission of the petitioner's counsel before conducting these in-custodial interrogations. (TR IV-574 to 575) He did not give petitioner any Miranda warnings during these visits. He attempted to rely on a Miranda warning he claimed to have given petitioner five

months earlier during a visit to him in another jail. (TR IV-559) The court of appeals said the objections of defense counsel at trial did not make specific reference to the Fifth and Sixth Amendments. Thus, the court of appeals did not address these problems with the admission of the testimony. Sharp at 618-619. Judge Teague, in his dissent, stated he would judge the admissibility of this evidence despite the inadequate objection under the Fifth and Sixth Amendments since defense counsel was "sandbagged" by the prosecutor. Sharp at 625-626.

b. Introduction of evidence seized as a result of petitioner's arrest pursuant to an invalid arrest warrant.

At trial, the identification of petitioner in a lineup, photos taken of petitioner, and the results of in-custodial interrogations of petitioner were presented to the jury. This evidence, among other evidence, was seized as a result of an invalid arrest warrant. The warrant was invalid because the affidavit upon which the arrest warrant was issued was insufficient. Petitioner's attorney properly preserved this point of error by making appropriate objections to the introduction of any evidence seized as a result of the illegal arrest. (TR IV-157 and 197)

Petitioner timely filed a Motion for New Trial, as amended, with the trial court stating that the trial court erred in admitting the evidence obtained after the illegal arrest. A new trial was not granted. The court of appeals affirmed the introduction of this evidence based on its conclusion that the affidavit was not in the record. Sharp at 617.

c. Failure to read indictment to the jury and state the not guilty plea to the jury.

The capital murder indictment was not read to the jury and the plea of the petitioner was not stated to the jury prior to the commencement of testimony in this case. (TR IV-11 to 18) The defense attorney first raised this error in the Motion for New Trial, as amended. (TR 1-109 to 122) A new trial was

not granted. The court of appeals found that the Motion was the proper method to show error in the record, but found petitioner's Motion was insufficient to overcome the statutory presumption of regularity in the proceedings because there was no affirmative showing of this error in the record. Sharp at 616-617.

d. Introduction of evidence seized during warrantless search of petitioner's vehicle.

Petitioner's 1981 Ford pickup truck was searched by the State prior to petitioner's arrest without a search warrant and without consent of the petitioner. A Motion to Suppress all of the evidence taken from that truck was filed prior to trial on behalf of petitioner. (TR 1-83) The error was properly preserved at trial when an objection was made by defense counsel to the introduction of any evidence seized as a result of this illegal search. (TR IV-199) The trial court later overruled the Motion to Suppress. (TR IV-217)

Petitioner timely filed a Motion for New Trial, as amended, with the trial court stating that the trial court had erred in admitting this evidence. A new trial was not granted. The court of appeals affirmed the introduction of this evidence, relying on the consent to search given by a third person. Sharp at 617.

e. Challenge to the constitutionality of the Texas sentencing scheme Prior to trial, petitioner filed a Motion to Exclude the Death Penalty as Possible Punishment based in part upon the fact that the special issue submission pursuant to Art. 37.071 Tex. Code Crim. Proc. provides no real standards for the guidance of juries in death penalty cases. He further referred to this possible punishment as being violative of the Eighth and Fourteenth Amendments. (TR 1-64 to 66) The trial court denied the Motion to Exclude, without opinion. (TR 1-66) Petitioner's court appointed counsel did not renew this constitutional challenge on appeal.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURT OF CRIMINAL APPEALS DECIDED TWO IMPORTANT ISSUES OF FEDERAL CONSTITUTIONAL LAW CONCERNING THE STATE'S USE OF (1) HIGHLY INFLAMMATORY, UNRELIABLE, IRRELEVANT, AND (2) ILLEGALLY OBTAINED TESTIMONY, AS EVIDENCE OF FUTURE DANGEROUSNESS DURING THE SENTENCING PHASE OF A CAPITAL MURDER TRIAL. THE FIRST ISSUE HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. THE TEXAS COURT'S DECISION ON THE SECOND ISSUE IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

(1)

During the sentencing phase, on the question of future dangerousness, the State first presented evidence from several witnesses of the petitioner's involvement in a theft by check incident and two armed robberies in the mid-1970's. The State then, over the vehement objections of defense counsel, presented the testimony of Detective Jerry Smith about locating the body of Blanca Arreola as a result of certain interrogations of the petitioner while he was being held in jail awaiting trial for the capital murder of Brenda Kay Broadway. (TR IV-556 to 578) Detective Smith testified that he did not know the cause of Blanca Arreola's death. Further, he stated that the petitioner had not been indicted for her death, nor was he expected to be indicted for her death. (TR IV-573) Detective Smith did not testify to any crime or violence committed by the petitioner in connection with the disappearance or the death of Blanca Arreola. The prosecutor drove home the expected impact of this evidence in his closing statement seeking the death penalty when he stated to the jury, in reference to Detective Smith's testimony about locating Blanca Arreola's body:

> I feel like we have presented you more than ample evidence. More than ample evidence. He gave up a body. Gave up a body. At least she got buried properly. She didn't have a Judge, a Jury or a lawyer. She didn't have a lawyer to protect her rights. What is a continuing threat to society? If I have ever seen a threat to society, this is it. Michael Eugene Sharp there.

(TR IV-592)

The testimony presented by Detective Smith is not, however, relevant to the future dangerousness question asked of the jury in the sentencing phase. Tex. Code Crim. Proc. Art. 37.071(b)(2). It does not relate at all to the probability of the petitioner to commit criminal acts of violence that would constitute a continuing threat to society. Detective Smith's testimony does not shed any light on that probability one way or the other. There was no testimony of the commission of any criminal act of violence by the petitioner in connection with the disappearance or death of Blanca Arreola.

The Court should resolve the important question of whether or not highly inflammatory, irrelevant and unreliable testimony of this type may be presented to a jury as evidence of future dangerousness in the sentencing phase of a capital murder trial.

The jury was implicitly being asked (after already finding the petitioner guilty of the capital murder of Brenda Kay Broadway) to wildly speculate on the circumstances of the death of Blanca Arreola and its relation to the probability that the petitioner would commit criminal acts of violence in the future. The wild conclusions the jury was expected to draw from this inflammatory testimony are apparent in two places. One is in the closing argument of the sentencing phase where the prosecutor inferred, without supporting evidence in the record, that the petitioner was somehow responsible for the death of Blanca Arreola.

The second indication of the State's expectation of the jury's intended use of the hidden inferences in this highly inflammatory testimony comes in its legal brief filed with the Texas Court of Criminal Appeals. There the State takes the inference and attempts to make it fact when it says, on page 15 of the brief:

> After his arrest, the Appellant took Jerry Smith, a detective with the Odessa Police Department, to a site north of Odessa, Texas and told him that he had buried a dead, pregnant eighteen year old girl named Blanca Arreola there after he had abducted her from the parking lot of a supermarket in Odessa, Texas and killed her.

There is no citation in the State's legal brief to any support in the sentencing record for this statement, because there is no evidence of such a crime or violent conduct in the record. The State wanted both the jury, the trial court and the court of appeals to draw these wild, unsupported conclusions from this unreliable testimony and vote for, render and uphold what can only be seen as an arbitrary, capricious and unreliable sentence of death.

The court of appeals found that the defense counsel's objection to the admissibility of this evidence was proper, but still upheld the death sentence by saying that evidence of unadjudicated crimes is admissible in the sentencing phase of a capital case. Sharp at 619. The court of appeals failed to recognize that Detective Smith's testimony is not evidence of an unadjudicated crime. It is not evidence of any crime, adjudicated or unadjudicated.

In Booth v. Maryland, 482 U.S. _____, 107 S.Ct. 2529 (1987), this Court held that a victim impact statement could not be used in the sentencing phase of a capital case since the statement was:

> ...irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.

482 U.S. at ___, 107 S.Ct. at 2533. The Court later stated:

> But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.

482 U.S. at ____, 107 S.Ct. at 2536.

In Gardner v. Florida, 430 U.S. 349 (1977) the trial court had relied on a confidential pre-sentence report about the defendant, which had not been disclosed to the defendant or his counsel, in arriving at a sentence of death. The death sentence was vacated by this Court. The Court stressed the interest of reliability in the sentencing phase of capital cases. The Court also stated:

> It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

430 U.S. at 358.

Justice Marshall has expressed concerns over the admission of evidence of unadjudicated offenses in the sentencing phase of capital cases in two recent dissents. Devier v. Kemp, ___ U.S. ___, 108 S.Ct. 338 (1987) and Williams v. Lynaugh, 484 U.S. ___, 108 S.Ct. 311 (1987). His dissents point out the conflict that is arising in state courts of last resort over the admissibility of evidence of unadjudicated offenses in the sentencing phase of a capital case. In the present case, the testimony that was presented to the jury was highly inflammatory and did not even rise to the level of evidence of an unadjudicated offense. The sentencing phase of petitioner's trial cannot be considered to have been a reliable one. This Court should rule such testimony is inadmissible under the Eighth and Fourteenth Amendments to the United States Constitution. The writ should be granted.

(2)

The Texas prosecutor in the present case withheld the in-custodial, oral statements of the petitioner to investigating officers from the defense counsel until presentation of those statements as a part of the sentencing phase of the petitioner's trial. In response to a specific pretrial request for the disclosure of such statements, the prosecutor stated there were none. (TR 1-5 to 17 and TR Pretrial-2 to 5) This Court made

its policy along this line perfectly clear when it vacated a death sentence where the prosecutor used surprise psychiatric testimony during the sentencing phase. Estelle v. Smith, 451 U.S. 454 (1981). The decision was based on the Fifth and Sixth Amendments which were held applicable even though the objections of defense counsel were not specific, as is the present case. Estelle, supra. In the present case, the surprise tactics of the State are readily apparent and cannot be condoned. Furthermore, the effort of the State to show that the defense had subpoenaed Detective Smith for trial should not be permitted as a cover for its earlier deceptive replies to legitimate discovery requests by defense counsel for petitioner. In the dissent of Judge Teague in Sharp at 618-619 he discusses how the prosecution "sandbagged" the defense counsel in this case. See Gardner v. Florida, supra (where the prosecution refused to let defense counsel see a pre-sentence report and cross-examine the persons who prepared it).

The statements at issue in the present case were admittedly obtained by the State without permission from defense counsel for an in-custodial interrogation and without current Miranda warnings. (TR IV 559 and 574) Miranda v. Arizona, 384 U.S. 436 (1966). The Fifth, Sixth and Fourteenth Amendment rights of the petitioner were violated. Brewer v. Williams, 430 U.S. 387 (1977).

The decision by the court of appeals in this case is in conflict with this Court's decisions in Gardner, supra, Estelle, supra, Miranda, supra and Brewer, supra. The decision should be reviewed by this Court.

II. WHERE THE AFFIDAVIT IN SUPPORT OF THE ARREST WARRANT UPON WHICH PETITIONER WAS ARRESTED IS INSUFFICIENT TO ALLOW A NEUTRAL AND DETACHED MAGISTRATE TO MAKE AN INDEPENDENT JUDGMENT THAT PROBABLE CAUSE EXISTED, PETITIONER'S FOURTH AMENDMENT RIGHTS HAVE BEEN VIOLATED AND ALL EVIDENCE SEIZED AS A RESULT OF THAT ARREST SHOULD HAVE BEEN EXCLUDED.

The court of appeals refused to consider petitioner's complaint that the issuance of the arrest warrant was illegal

because the affidavit (sometimes referred to as a complaint in the record) upon which the arrest warrant was issued was not in the record. However, although the affidavit itself was not introduced at the trial, the record does establish the contents of that affidavit as it relates to probable cause.

Deputy Eggleston, the chief investigating officer, obtained an arrest warrant for Michael Sharp on June 14, 1982; the warrant was issued based on Eggleston's affidavit. (TR IV-153) At trial, petitioner's attorney established the contents of that affidavit, as it relates to probable cause, with the following question to Eggleston:

> Q: Now, Mike, on any complaint that you signed in regard to this investigation, it is my understanding that when you signed the complaint in the presence of the District Attorney or the Justice of the Peace or whoever it might have been, that probable cause, as you set out on the complaint, was, "I have good reason to believe and do believe, based upon the following information. My investigation." Do you recall that, sir?
>
> A: Yes, sir.

(TR IV-155)

In an apparent attempt to cure the faulty affidavit, the State questioned Deputy Eggleston about his verbal conversations about the crime with Justice of the Peace Rutledge who issued the arrest warrant. The absence of any written factual support in the affidavit other than "my investigation" was confirmed in the following examination:

> Q: Mike, you had that information but you didn't put it in your complaint, did you?
>
> A: No, sir. I don't believe it is typed in there.

(TR IV-160)

The record establishes that the affidavit upon which the arrest warrant for petitioner was issued contained only the following language related to probable cause: "I have good reason to believe and do believe, based upon the following information. My investigation." (TR IV-155) As this Court has

consistently held, an arrest warrant based on this type of language is illegal. Petitioner's attorney properly preserved this point of error by making appropriate objections at the time Eggleston began discussing the arrest pursuant to the illegal warrant. (TR IV-157 and 197)

The language of the Fourth Amendment concerning the issuance of warrants is applicable to both arrest and search warrants. McGrain v. Daugherty, 273 U.S. 135, 154-157 (1927). The purpose of the Fourth Amendment requirements for the issuance of warrants is to ensure that the inferences which come from the facts that led to the supporting affidavit "...be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948).

Thus, an unbiased magistrate must determine, after a detached review of the facts stated in the affidavit, whether the "probable cause" required to support an arrest warrant actually exists. The magistrate should judge the persuasiveness of the facts relied on and should not accept without question the affiant's mere conclusion that the person to be arrested has committed a crime. Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560 (1971). Further, when an affidavit is based on hearsay, the affidavit must establish the "veracity" and "basis of knowledge" of the person supplying the hearsay information before an independent judgment can be made. Illinois v. Gates, 462 U.S. 213, 238 (1983).

In Whiteley, this Court cited to numerous other decisions which reiterated the requirement of an independent judgment of the existence of probable cause. Among the other decisions cited was Giordenello v. United States, 357 U.S. 480 (1958). In Giordenello, an arrest warrant was issued based on the following sworn complaint:

> The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, in Houston, Texas, in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.
>
> And the complainant further states that he believes that [names omitted] are material witnesses in relation to this charge.

357 U.S. at 481. The Court found that the issuance of the arrest warrant was illegal because the affidavit which supported the arrest warrant contained no affirmative allegation that the officer had personal knowledge of the matters contained, did not indicate any sources for the complainant's belief, and did not set forth any other sufficient basis upon which a finding of probable cause could be made. The Court rejected the contention that these deficiencies could be cured by reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer. A mere conclusion was insufficient for the magistrate to satisfy himself that the affiant, was possessed of facts that legally justified the conclusion that a crime has been committed and that the accused committed it. 357 U.S. at 486.

In a further attempt to ensure that all of the probable cause information is before the issuing magistrate and that there is no subsequent dispute as to the information used by the magistrate as a basis for his finding of probable cause, this Court has also held that its analysis of the sufficiency of the affidavit is bounded by the four corners of the affidavit. Gaston v. Texas, 396 U.S. 969 (1969). Therefore, the state's attempt to introduce evidence of what Deputy Eggleston verbally told the magistrate, but just did not put in the affidavit, does not cure the insufficient affidavit. Since such information was not in the affidavit, it cannot be reviewed in determining whether the magistrate had sufficient information to make a finding of probable cause. The "four corners of the document"

requirement ensures that there is no attempt to use after-acquired knowledge to supplement the information that was given to the magistrate to obtain the arrest warrant.

Petitioner asserts that the supporting affidavit for the arrest warrant is even more insufficient than the one rejected by this court in Giordenello, and it does not allow a neutral and detached magistrate to make an independent judgment that probable cause existed for the issuance of the arrest warrant. In this case, the affidavit contains no affirmative allegation that Deputy Eggleston spoke with personal knowledge of the matters contained therein, does not establish the "veracity" and "basis of knowledge" of his hearsay information, and fails to indicate any source for his conclusions other than "my investigation." The affidavit in this case cannot support the issuance of an arrest warrant.

Petitioner submits that because the arrest was illegal due to an invalid affidavit, the trial court should have suppressed all subsequent evidence obtained and introduced, including evidence of the identification of petitioner by Selena Elms at a lineup, photographs taken of petitioner, and the in-custodial interrogations of petitioner. The failure of the trial court to suppress the evidence was reversible error, and the use of evidence obtained as a result of an illegal arrest warrant violated petitioner's Fourth Amendment protections. The court of appeals should have reversed petitioner's conviction on this basis. It did not. This Court should review the decision of the court of appeals.

III. THE TEXAS COURT OF CRIMINAL APPEALS' DECISION DOES NOT ENSURE THAT THE INDICTMENT WAS READ TO THE JURY AND THE NOT GUILTY PLEA WAS STATED TO THE JURY PRIOR TO THE TAKING OF TESTIMONY, WHICH IS IN CONFLICT WITH IMPORTANT CONSTITUTIONAL PROTECTIONS.

The record at trial reflects that the trial court arraigned the petitioner outside the presence of the jury. The indictment was read to the petitioner and he plead not guilty. The record shows the jury was brought in later, given the oath,

heard the opening statement and testimony began. (TR IV-11 to 17) The indictment was never read to the jury, nor was the petitioner's plea of not guilty stated to the jury, prior to testimony being taken. Issue was never joined and the jury could only speculate as to the charges levied against the petitioner and his plea thereto. Only when the Charge of the Court was read, after the close of all testimony, did the jury finally hear of the formal indictment and the not guilty plea. (TR IV-493 and TR 1-85 to 93) The jury, nevertheless, found the petitioner guilty as charged in the indictment. (TR 1-94)

It is important for this Court to ensure the reading of the capital murder indictment of an accused person to the jury and the taking of his plea in front of a jury. Otherwise, a jury might reach an arbitrary, capricious or unreliable verdict. This would not accord with the Sixth, Eighth or Fourteenth Amendments to the United States Constitution or the Court's holdings beginning with Gregg v. Georgia, 428 U.S. 153 (1976).

The court of appeals found that a motion for new trial was a proper method to show this type of error in the record. Sharp at 616. However, the court of appeals erroneously held petitioner's Motion, as amended, was insufficient to overcome the statutory presumption of regularity in the proceedings. It concluded, in error, that the petitioner failed to make an affirmative showing in the record that the indictment was not read to the jury and that his plea was not stated to the jury prior to the taking of testimony. The court of appeals also erroneously referred to the judgment of the trial court and the docket sheet as stating that the indictment was read to the jury and a plea taken before the jury prior to the taking of testimony. Sharp at 616.

At no point in the record is there any indication of a reading of the indictment or the taking of a plea in the presence of the jury prior to the commencement of testimony.

The irregularity is present on the face of the transcript. It shows by its very omission what did not happen. Only what did happen is actually included in the record.

The docket sheet entries in question do not support the conclusion of the court of appeals. For May 16, 1983, the docket sheet simply states:

> All parties present, including defendant. Case was called. State announced ready. Defendant announced ready subject to Motions heretofore filed and acted upon by the Court. Indictment was read. Defendant personally entered a plea of "Not Guilty". Evidence began.

(TR 1-61) The docket sheet entries about the reading of the indictment and the entering of the plea merely reflect the arraignment in this instance. At the arraignment the indictment was read to the petitioner. His plea was taken at the arraignment. The jury was not present. The docket sheet does not reflect affirmatively that the indictment was read to the jury or the petitioner's plea stated to the jury. The court of appeals is erroneously making this inference.

The court of appeals also indicates that the judgment of the trial court states the indictment was read to the jury and a plea was taken before the jury. Sharp at 616. In the May 19, 1983 Charge of the Court, presented to the jury after all testimony had been received in the case, the trial court, for the very first time, actually read from the allegations set forth in the indictment and stated that the defendant had pleaded not guilty to the charge. (TR 1-85 to 93 and IV-493) Thus, the judgment of the trial court is correct in that the allegations in the indictment and the defendant's plea of not guilty thereto were eventually read to the jury. The judgment does not, however, show this was done prior to the taking of testimony.

It is critical that the issues be joined in a capital murder trial prior to the taking of any testimony. Otherwise unreliable verdicts and sentences of death might result. The

Court has stated the Constitution of the United States requires reliability in capital cases. Gardner v. Florida, supra.

The joining of the issues in a capital case before a jury hears any testimony is so important that the State should be required to read the indictment to the jury and take the petitioner's plea thereto in front of the jury before any testimony is taken and to have the record affirmatively reflect those facts. Otherwise, juries will arrive at arbitrary, capricious or unreliable verdicts and sentences that do not accord with the Sixth, Eighth and Fourteenth Amendment rights granted to all citizens in this country under the United States Constitution. This would conflict with many prior decisions of this Court. The Court should review the court of appeals' decision.

IV. THE DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS IS IN CONFLICT WITH UNITED STATES v. MATLOCK IN THAT IT PERMITTED THE USE OF EVIDENCE SEIZED AS A RESULT OF A WARRANTLESS SEARCH OF A VEHICLE WHERE CONSENT TO SEARCH WAS NOT GIVEN BY A PERSON WITH COMMON AUTHORITY OVER THE VEHICLE.

The State admitted that a 1981 Ford pickup truck assigned to petitioner as part of his employment was searched prior to petitioner's arrest without a search warrant and without the consent of the petitioner. (TR IV-200) A Motion to Suppress all of the evidence taken from that truck was filed (TR 1-83), and the error was properly preserved at trial when an objection was made to testimony tendered concerning what was found in the truck. The Motion to Suppress was denied. (TR IV-199) The testimony and evidence were admitted.

The State relied on the consent given by W. C. Stokes, the drilling superintendent for Rod Ric Drilling Company (TR IV-200), petitioner's employer, as justification for its warrantless search of the truck. The title to the truck showed the owner was B.R.H. Corporation. (TR IV-203) Stokes described the degree of control he had over the truck, but admitted that petitioner had responsibility for the truck for company

business, which included going to and from work. Thus, it was appropriate for the truck to be located at petitioner's house. (TR IV-209) Stokes admitted that he had never been in actual physical possession of the truck after he had assigned it to petitioner in February, 1982 until after the search of the truck. (TR IV-223)

Concerning the sequence of events leading up to the execution of the consent, Stokes testified that he had been in contact with the Ector County Sheriff's Office all day long on June 14, 1982. (TR IV-212) Petitioner had called in that morning to make his drilling rig report and then could not be found by Stokes the rest of the day. Stokes attempted to contact petitioner in his vehicle and at his residence around 5:00 or 6:00 p.m. but was unable to do so. (TR IV-208) However, he did not believe it was unusual to be unable to find a tool pusher for a period of time. (TR IV-207) By 6:00 p.m., Stokes had fired petitioner but had not repossessed the truck, nor told petitioner that he was fired or that the truck was no longer his. (TR IV-208) Stokes was then asked to sign the consent and did so. (TR IV-212) He did not pick up the truck, and it was not in his possession when he signed the consent or prior to the time that the vehicle was searched. The vehicle "was parked at [petitioner's] house" and had never been in the physical possession of Stokes. (TR IV-213).

A search conducted without a warrant is per se unreasonable and therefore illegal under the Fourth Amendment unless the search falls within one of the few well recognized exceptions to the general rule. As this Court stated in Coolidge v. New Hampshire, 403 U.S. 443, 445 (1971):

> Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions which are jealously and carefully drawn; there must be a showing by those who seek exemption... that the exigencies of the situation made that course imperative, and the burden is on those seeking the exemption to show the need for it.

See also Katz v. United States, 389 U.S. 347, 357 (1967).

In determining whether a consent to search is valid, this Court in United States v. Matlock, 415 U.S. 164 (1974), held that a consent search is fundamentally different in nature from the waiver of a trial right. The Court noted that when the state seeks to justify a warrantless search by proof of voluntary consent it must show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. The Court then gave a detailed explanation of what was meant by "common authority":

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements [citations omitted] but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. (emphasis added)

415 U.S. at 171, n. 7. See Fludd v. U.S. Secret Service, 771 F.2d 549 (D.C. Cir. 1985).

Therefore, the focus of the inquiry as to the validity of the consent is not on the property rights Stokes had in the truck. It is irrelevant which entity technically owned the truck. Rather, the issue is whether the State established that Stokes had mutual use of the vehicle with petitioner and that Stokes had joint access or control over the truck for most purposes. Stokes never had the truck in his actual physical possession from the time he first assigned it to petitioner in February of 1982 until after the warrantless search and seizure had been conducted. Certainly then, there was no mutual use of the truck by Stokes. Although Stokes initially claimed to have sufficient control over the truck, his admissions under

cross-examination make it clear that he exercised no right of joint access or control over that truck. He admitted that it was appropriate for the truck to be at Sharp's home, and that the truck was to be used for going to and from work.

Stokes' claim that he fired petitioner because he could not locate him before 6:00 p.m. is not consistent with his testimony that it was not unusual to be unable to reach a tool pusher for a period of time. Rather, he was in contact with the Sheriff's office the entire day, and it appears that the firing was done at the suggestion of the Sheriff's office since this would bolster the consent given by Stokes. Further, if Stokes had been serious about the firing of petitioner, he would have seized the truck immediately. Instead, he merely signed the consent and let the officers search the vehicle. The evidence at trial showed that the petitioner had been a suspect since early Monday morning and the investigating officers suspected the truck may have been used in the offense. Police officers had petitioner's home under surveillance all day long and the vehicle was not moved by petitioner. If, in fact, there existed probable cause to search the vehicle, there was no reason that a search warrant could not be obtained. The State, however, chose not to attempt to establish probable cause and obtain a search warrant, but instead relied on an invalid consent.

This Court should grant this petition and review the decision of the court of appeals since that decision is in conflict with United States v. Matlock, supra and other decisions of this Court.

V. AS APPLIED, THE FIRST AND SECOND CAPITAL SENTENCING QUESTIONS IN TEXAS DO NOT SATISFY THE CONSTITUTIONAL REQUIREMENTS FOR CAPITAL SENTENCING PROCEDURES ARTICULATED BY THIS COURT IN CASES DECIDED SINCE JUREK.

This case also presents an issue identical to the issue currently before this Court in Franklin v. Lynaugh, No. 87-5546 (cert. granted, October 9, 1987) -- whether the first and second Texas sentencing questions provide constitutionally adequate

sentencing guidance in light of the requirements for capital sentencing procedures articulated by this Court in cases decided after Jurek v. Texas, 428 U.S. 262 (1976).

After the jury found petitioner guilty of capital murder, it heard additional evidence prior to sentencing. At the conclusion of the sentencing evidence, the jury received the written Court's Charge on Punishment, containing, in part, instructions for them to answer the first and second Texas sentencing questions. See Art. 37.071(b)(1) and (2) Tex. Code Crim. Proc. (TR 1-98 to 102) As in Franklin, these instructions did not permit the jury to consider relevant mitigating evidence that could have justified a sentence less than death.

Petitioner presented evidence during the guilt/innocence phase of the trial that cast doubt on the identification of him as the killer of Brenda Kay Broadway. For example, the identifying witness, Selena Elms, stated the pickup truck she saw had several lines of white lettering on the side. Petitioner's pickup truck had no lettering on it. (TR IV-461) She also stated the man she saw was a big man, about 35 or 36 years old, who parted his hair on the side. (TR IV-458, 459, 462) The petitioner was 28 and the trial exhibits showed he parted his hair in the middle and was a slightly built man. Elms underwent hypnosis by police officers just the day after the incident. (TR IV-451) There is testimony that she was prompted to remember some of the things she remembered. (TR IV-452) The jury apparently had some hesitation in accepting Elms' identification of the petitioner since it asked for testimony and exhibits pertaining to the identification after it had retired to the jury room. (TR 1-96) While all of this evidence, and more, may not have placed a reasonable doubt as to guilt in the jury member's minds, it may have left some residual doubt as to guilt in their minds. The jury should be permitted by express instruction in the sentencing phase to acknowledge

and consider this residual doubt as to guilt.

Nothing in the two Texas questions informed the jury that it could consider the aspects of such evidence that would mitigate against the imposition of the death penalty. Indeed, since the inquiry was focused primarily on the two specific questions asked, a juror could reasonably have concluded that he was precluded from considering evidence not directly relevant to either question. Finally, even if a juror wanted to consider such evidence creating a residual doubt and felt on balance that it justified a sentence less than death, the two questions do not permit a juror to give such evidence any effect. Under the Texas scheme, a juror has no means of expressing the view based on residual doubt evidence, not directly relevant to either question, that a sentence of less than death is appropriate.

Thus, this case presents precisely the same issue that is before the Court in Franklin v. Lynaugh. The petitioner in Franklin frames this issue in his brief as follows: "Did jury instructions given pursuant to article 37.071(b) of the Texas Code of Criminal Procedure deprive the jury of any procedure for considering and expressing the conclusion that the mitigating evidence called for a sentence less than death?"

Petitioner in the present case did raise prior to trial a challenge to the guidance given to jurors in connection with the two questions, but he did not renew the challenge on appeal to the court of appeals. This Court has recognized that it has the power, in appropriate cases, to decide important questions not raised by the parties below once its jurisdiction is otherwise established, Illinois v. Gates, 462 U.S. 213, 219-20 (1983), particularly where, as here, material errors were not raised below in a capital case, Fisher v. United States, 328 U.S. 463 (1946), and the issue is presented in a case that is already pending. Carlson v. Green, 446 U.S. 14, 17 N.2 (1980). The Court plainly has jurisdiction over the other issues presented in this petition. They are important constitutional

issues and were properly raised below.

Because the same issue is already before the Court in Franklin, however, the Court may prefer to defer consideration of the petition with respect to this issue pending its decision in Franklin. Should this Court reverse Franklin, the court of appeals in Texas will apply the benefits of Franklin to this case, even though this issue was not raised in the court of appeals by petitioner here. See Texas v. Chambers, 688 S.W.2d 483 (Tex.Crim.App. 1984), cert. denied, 474 U.S. 864 (1985). As a consequence, it may be appropriate for this Court to hold the petition on this issue until Franklin is decided and to return this case to the Texas courts for further consideration in light of its decision in Franklin. Such a disposition of this case would be in the interests of justice and of efficient judicial administration and would obviate the need for petitioner to pursue further post-conviction proceedings in the Texas state courts, pending the disposition by this Court of Franklin.

CONCLUSION

The Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals should be granted. In the alternative, the Court may wish to defer the disposition of the petition pending its decision in Franklin v. Lynaugh, No. 87-5546 (cert. granted, October 9, 1987).

Respectfully submitted,

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Dated: May 13, 1988

APPENDIX A

Michael Eugene SHARP, Appellant,

v.

The STATE of Texas, Appellee.

No. 69301.

Court of Criminal Appeals of Texas, En Banc.

April 9, 1986.

Defendant was convicted after jury trial in the 112th Judicial District Court, Crockett County, James H. Clack, J., of capital murder, and received sentence of death, and defendant appealed. The Court of Criminal Appeals, White, J., held that: (1) defendant's supervisor had sufficient control to establish valid consent to search of pickup truck; (2) juror, who stated she could never vote for death penalty, was properly excused for cause; and (3) failure of indictment to include three special issues required to impose death penalty did not render indictment insufficient.

Affirmed.

Miller, J., concurred in result only in ground of error 16, but otherwise joined opinion of majority.

Teague, J., filed dissenting opinion.

Clinton J., dissented.

1. Criminal Law ⇐553

Jury, being judges of facts and credibility of witnesses, can choose to believe or not believe witnesses, or any portion of their testimony.

2. Criminal Law ⇐553

Witness may be believed even though some of his testimony may be contradicted.

3. Criminal Law ⇐339.9(3)

Even total failure to identify defendant on one occasion goes only to weight of that person's identification testimony, not its admissibility.

4. Homicide ⇐250
Kidnapping ⇐5

Discrepancies in testimony of only witness who identified defendant as person who committed kidnapping and murder of her mother as to tattoo she noticed on defendant and existence of white lettering on doors of defendant's truck went only to weight of evidence, not its admissibility, and thus, did not render defendant's conviction invalid on ground of insufficiency of evidence.

5. Criminal Law ⇐577.14

State's announcement of ready for first case carried to subsequent case state's previous compliance with speedy trial time limits. Vernon's Ann.Texas C.C.P. art. 32A.02.

6. Criminal Law ⇐577.12(1)

Defective charging instrument does not, in and of itself, indicate State was not prepared for trial on date it announced ready.

7. Criminal Law ⇐1063(1)

Motion for new trial is proper method to show error in record contrary to statutory presumption of regularity in proceedings. Vernon's Ann.Texas C.C.P. art. 44.24(a).

8. Criminal Law ⇐1063(1)

Defendant's motion for new trial which contained affidavit of court reporter stating that indictment was read to defendant during arraignment, outside presence of jury, was insufficient to negate statutory presumption of correctness, where defendant had requested to be and was arraigned outside presence of jury, and affidavit never addressed whether indictment was ever read to jury and plea taken before jury as required by statute. Vernon's Ann.Texas C.C.P. arts. 36.01, subd. 1, 44.24(a).

9. Searches and Seizures ⇐173

Third persons can consent to searches if they have control over and authority to use premises being searched.

10. Searches and Seizures ⇐173

Authority of defendant's supervisor to assign or reassign trucks to all tool pushers under his supervision, one of whom was defendant, was sufficient control by defendant's supervisor to establish valid consent to search of truck, regardless of truck's location.

11. Criminal Law ⇐1120(8)

Defendant's assertion that affidavit upon which arrest warrant was obtained made only legal conclusions and did not state facts sufficient to justify finding of probable cause was not preserved for appeal, where affidavit complained of was not in record before Court of Criminal Appeals.

12. Criminal Law ⇐1170½(1)

Cross-examination of sole eyewitness in order to impeach her by pointing out discrepancies between her direct testimony and her prior statements concerning defendant's description cured error in allowing bolstering testimony prior to identification testimony by witness.

13. Criminal Law ⇐398(1)

Best evidence rule does not apply when item in question is not admitted into evidence to prove its contents.

14. Criminal Law ⇐400(1)

Best evidence rule applies only to documents.

15. Criminal Law ⇐398(1)

Best evidence rule was not violated when prosecuting attorney questioned witness from transcript of tape recording rather than tape recording itself, where neither tape nor transcript were offered into evidence by either defendant or State, and defendant's attorney had access to tape.

16. Homicide ⇐354

Allowing detective, over objection, to testify during punishment phase of defendant's capital murder trial about conversations detective had with defendant concerning disappearance, death, and recovery of body of victim of another offense did not prejudice defendant's right to fair and impartial jury trial. Vernon's Ann.Texas C.C.P. art. 89.14; U.S.C.A. Const.Amends. 6, 14; Vernons' Ann.Texas Const. Art. 1, § 10.

17. Criminal Law ⇐1043(3)

Objection at trial to testimony of detective as to conversations detective had with defendant concerning disappearance, death and recovery of body of unrelated victim on ground evidence was inadmissible extraneous offense evidence was insufficient to preserve alleged error in admission of testimony on grounds prosecuting attorney affirmatively represented that no oral statements were made by defendant and none would be used by prosecution, that statements were not reduced to writing nor electronically recorded, that statements were made while defendant was in custody and represented by counsel, and that there was no showing by state of voluntary waiver of rights by defendant. Vernon's Ann. Texas C.C.P. arts. 38.22, 39.14; U.S.C.A. Const.Amends. 5, 14; Vernon's Ann.Texas Const. Art. 1, § 10.

18. Criminal Law ⇐1043(3)

Error presented on appeal must be same as objection raised at trial.

19. Homicide ⇐354

Detective's testimony concerning conversations detective had had with defendant concerning disappearance, death and recovery of body of unrelated victim was admissible at punishment phase of capital murder case.

20. Criminal Law ⇐656(9)

Trial court's statement to entire jury panel that "His guilt is established beyond a reasonable doubt" was not improper comment upon weight of evidence, where comment followed trial court's statement that every person is presumed to be innocent until proven guilty by legal and competent evidence presented to jury during trial and under direction of court and preceded statement that it was duty of jury to find defendant not guilty if jury should have reasonable doubt as to defendant's guilt.

21. Jury ⇐106, 132

Proper standard to be used in disqualifying jurors in death penalty case is whether juror's views would prevent or substantially impair performance of his duties as juror in accordance with instructions and oath; furthermore, there is no requirement that juror's bias be proved with unmistakable clarity.

22. Jury ⇐106

Juror, who stated she would be opposed to death penalty regardless of facts, that there were no circumstances in which she could personally ever vote for death penalty, and that she could not take oath that her feeling and opposition to death penalty would not affect her voting in any way, was properly excused for cause in prosecution of defendant for capital murder.

23. Criminal Law ⇐1166.18

Defendant failed to carry burden of establishing prejudice from trial court's failure to excuse juror for cause and failure to grant extra peremptory challenges for alternate jurors, where defendant did not use all his peremptory challenges.

24. Criminal Law ⇐1035(5)

Defendant cannot challenge juror for cause, get ruling, then withdraw challenge, and complain of error on judge's part.

25. Indictment and Information ⇐60, 116

Everything necessary to be proven to sustain conviction in guilt/innocent phase must be alleged in indictment, but indictment need not state more.

26. Indictment and Information ⇐113

Failure of indictment to include three special issues which must be found by a jury in order to impose death sentence did not render indictment insufficient for failure to apprise defendant of nature and cause of accusation. Vernon's Ann.Texas C.C.P. art. 37.071(b).

Glen Williamson, Andrews (Court-appointed), for appellant.

Michael L. Postel, Dist. Atty., and Stephen Taliaferro, County Atty., Kermit, and Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

WHITE, Judge.

This case is on appeal from a conviction for the capital murder of Brenda Kay Broadway, which occurred in Winkler County in June of 1982. The case was tried in Crockett County on a change of venue. Appellant was found guilty, sentenced to death, and thereafter gave notice of appeal. Appellant has submitted his brief to this Court pursuant to the provisions of Arts. 40.09 and 37.071, V.A.C.C.P., and seeks either a reversal of the judgment and dismissal of the charges against him or, in the alternative, a new trial.

The testimony in the trial court revealed the following sequence of events:

On Friday, June 11, 1982, at approximately 12:30 a.m., Brenda Kay Broadway, the victim herein, returned home from work. She and her two children, Christy Michelle Elms, age 8, and Salina Kay Elms, age 14, then left their home to go wash Brenda's car. Soon after they arrived at the car wash, appellant forced Brenda and her two daughters, at knife point, into his truck and began driving south from Kermit on the Monahans highway. After appellant made Brenda and the two girls remove their clothes, he turned off the highway onto a dirt road, tied them with rope, and forced Salina and her mother to perform deviate sexual acts upon each other.

Appellant then began to stab Brenda. At this point, Salina, the only surviving eye-witness, worked her legs free and escaped. Salina stated that she wandered through the woods the majority of the early hours of June 11, 1982, stopping only to rest. Near dawn, Salina came upon a drilling rig, where the men there untied her, gave her a blanket to cover herself, and called police. The police transported Salina to a local hospital. The bodies of Brenda Kay Broadway and Christy Michelle Elms

were found in a shallow grave later that morning by a search party, made up of deputy sheriffs from Winkler and Ward Counties.

On Monday morning, June 14, Winkler County Deputy Sheriff Mike Eggleston, based on a composite sketch and a statement taken from Salina, obtained an arrest warrant for appellant. Several officers went to the drilling rig where appellant worked, but appellant was not there. After hearing that appellant was possibly en route to Louisiana, Deputy Eggleston wired several police departments along a probable route. Appellant was arrested pursuant to the arrest warrant in Sweetwater on June 16, 1982.

We will first address the appellant's ground of error twenty alleging insufficiency of the evidence. Appellant contends that because there are discrepancies in the only eyewitness' testimony, and differences in the explanation of certain circumstantial evidence, there is no more than a strong suspicion or mere probability of appellant's participation in the offense charged.

In reviewing a sufficiency of the evidence claim, this Court has held that the standard for review is the same for both direct and circumstantial evidence. *Wilson v. State*, 654 S.W.2d 465, at 471 (Tex.Cr.App.1983) (opinion on rehearing); *Denby v. State*, 654 S.W.2d 457, at 464 (Tex.Cr.App. 1983) (opinion on rehearing); *McGoldrick v. State*, 682 S.W.2d 573 (Tex.Cr.App.1985). See also *Hankins v. State*, 646 S.W.2d 191 (Tex.Cr.App.1981) (opinion on rehearing 1983).

In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), reh.den. 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126, the United States Supreme Court held that the standard for judging sufficiency questions would be whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. 443 U.S., at 319, 99 S.Ct. at 2789.

[1-4] In the present case, Salina Kay Elms, the only eyewitness, affirmatively stated appellant was the person who committed the kidnapping and murder of the deceased. Appellant makes issue of slightly different descriptions by Salina of a tattoo she noticed on appellant, and the discrepancy between Salina's and W.C. Stokes' [appellant's supervisor] testimony concerning the existence of white lettering on the doors of appellant's company truck. The jury, being the judges of the facts and credibility of the witnesses, could choose to believe or not believe the witnesses, or any portion of their testimony. *Esquivel v. State*, 506 S.W.2d 613 (Tex.Cr.App.1974). Further, a witness may be believed even though some of his testimony may be contradicted and part of his testimony recorded, accepted, and the rest rejected. See *Jackson v. State*, 505 S.W.2d 916 (Tex.Cr. App.1974). Even a total failure, (not the case here), to identify the defendant on one occasion goes only to the weight of that person's testimony, not its admissibility. *Wilson v. State*, 581 S.W.2d 661, at 665 (Tex.Cr.App.1979) (opinion on rehearing).

Ground of error twenty is overruled.

In his first ground of error, appellant claims the indictment in the instant case, cause no. 2971 (Crockett County cause no. 1420), should have been dismissed under Art. 32A.02, V.A.C.C.P., because the State did not announce ready until December 6, 1982, more than 120 days after commencement of the proceedings on June 16, 1982. See Art. 32A.02, Secs. 1(1) and 2(a). Therefore, according to appellant, under our holding in *Pate v. State*, 592 S.W.2d 620 (Tex.Cr.App.1980), the State could not have possibly been ready within the 120 day requirement of Art. 32A.02, Sec. 1(1), V.A.C.C.P.

Due to the complexity of this contention, we will set out the procedural history of this case.

The Winkler County grand jury returned an indictment against appellant on June 21, 1982 for the capital murder of Brenda Kay Broadway in cause no. 2919. The State announced ready on August 31, 1982. This

case, with another, charging the capital murder of Christy Elms, was transferred to Lubbock County on a change of venue. The date of this transfer does not appear in the record. In a trial in Lubbock which was concluded on November 17, 1982, appellant was convicted of killing Christy Michelle Elms and sentenced to life imprisonment. However, it is not apparent whether the conviction was for capital murder or murder. See Arts. 19.02 and 19.03, V.A.C.C.P.

On November 24, 1982, a Winkler County grand jury re-indicted appellant for the capital murder of Brenda Kay Broadway, cause no. 2971. The State announced ready in cause 2971 on December 6, 1982. At this point in time, there were two indictments pending and two announcements of ready for the same offense, namely, the capital murder of Brenda Kay Broadway.

The State elected to try cause no. 2971 (the Nov. 24, 1982 indictment) and not 2919 (the June 21, 1982 indictment). Both parties stipulated that a trial in one cause would be a bar to a trial in the other. On March 7, 1983, cause no. 2971 was transferred to Crockett County on a change of venue.

[5] It is the State's contention that the time spent in the Lubbock trial for the murder of Christy Michelle Elms is excludable from the time computation in the present case because under Art. 32A.02, Sec. 4(1), V.A.C.C.P.[1] the Speedy Trial statute is tolled when a defendant is involved in trials on other charges.[2] The State also contends that when a subsequent indictment for the same offense is returned by the grand jury, the State's announcement of ready for the first case carries to the subsequent case a previous compliance with any speedy trial time limits. In other words, if the announcement of ready in cause no. 2919, made on August 31, 1982, complied with Art. 32A.02, supra, the State asserts that a subsequent indictment which would not satisfy the time limits of Art. 32A.02, supra, on its own, would be validated for speedy trial purposes by a previous announcement of ready for the same case which complied with Art. 32A.02.

While the time spent in Lubbock would be excludable as another matter involving the appellant, see Art. 32A.02, Sec. 4(1), V.A.C.C.P., it is unclear in this case just exactly how much time was spent in Lubbock. However, we find the State's alternative contention to be meritorious, so the amount of time spent in the Lubbock trial is irrelevant for the disposition of this ground of error.

[6] In *Ward v. State*, 659 S.W.2d 643 (Tex.Cr.App.1983), this Court held when a defective information (filed within the statutory period) was replaced with a valid information after the time period had run, there was no speedy trial issue. We rejected the requirement of a valid charging instrument to show the State's readiness for trial. Further, we held that *Pate*, supra, was distinguishable because no charging instrument was *ever* filed, and a trial cannot be had unless there is some type of pleading, but in *Ward*, supra, the charging instrument and the State's announcement of ready were within the time limits of Art. 32A.02. A defective charging instrument does not, in and of itself, indicate the State was not prepared for trial on the day it announced "ready." See *Ward*, supra, at 647.

In the instant case, it is unclear whether the indictment in cause no. 2919 (the first capital murder indictment) was actually defective because that indictment is not in the record. The only facts before us are that a subsequent indictment was returned by the

1. "Sec. 4. In computing the time by which the state must be ready for trial, the following periods shall be excluded:
"(1) a reasonable period of delay resulting from other proceedings involving the defendant, including but not limited to proceedings for the determination of competence to stand trial, hearing on pretrial motions, appeals, and trials of other charges."

2. As noted before, the indictment in the instant case had also been transferred to Lubbock County along with the case involving Christy Michelle Elms.

Winkler County grand jury. However, if a *defective* indictment, filed within the time limits of Art. 32A.02, can be replaced with a valid one filed after the time has run, under *Ward*, supra, we see no reason why an indictment, either defective or valid, which complied with Art. 32A.02, could not be replaced with a second valid indictment filed after the allotted time. The pre-trial statement of facts indicates that both indictments alleged the capital murder of the same victim. We find no error. Ground of error one is overruled.

Appellant's second ground of error is that the trial court committed reversible error by not reading the indictment to the jury or taking his plea in the presence of the jury. Appellant cites *Essary v. State*, 58 Tex.Cr.R. 596, 111 S.W. 927 (Tex.Cr.App.1908); *Theriot v. State*, 89 Tex.Cr.R. 428, 231 S.W. 777 (Tex.Cr.App.1921); and *Peltier v. State*, 626 S.W.2d 30 (Tex.Cr.App.1981), as authority that the provisions of Art. 36.01(1), V.A.C.C.P., are mandatory. Article 36.01, V.A.C.C.P., reads in relevant part:

> "A jury being impaneled in any criminal action, the cause shall proceed in the following order.
>
> 1. The indictment or information shall be read to the jury by the attorney prosecuting...."

The State maintains that appellant failed to make issue in the trial court because there was no objection. The State also claims a motion for new trial is insufficient to affirmatively show error in the record, and alternatively, if a motion for new trial is a proper method to show error, then appellant's is insufficient to overcome the presumption in Art. 44.24(a), V.A.C.C.P.

By its express terms, Art. 44.24(a), supra, prescribes a presumption of regularity in the proceedings unless (1) the error has been brought to the attention of the trial court; or (2) there is an affirmative showing to the contrary in the record. See Art. 44.24(a), V.A.C.C.P. Appellant made no objection at trial, so the only part of Art. 44.24(a) that is applicable is whether there exists an affirmative showing to the contrary in the record. See *Warren v. State*, 693 S.W.2d 414, at 416 (Tex.Cr.App.1985).

The issues to be decided then, under the facts of this case, are: First, is a motion for new trial a proper method to apprise the court contrary to the presumption created in Art. 44.24(a); and second, assuming a motion for new trial is proper, was *appellant's* motion for new trial adequate?

[7] A motion for new trial is a proper method to show error in the record. *Warren*, supra, at 416; *Mays v. State*, 51 Tex.Crim. 32, 101 S.W. 233 (1907); and *Noble v. State*, 50 Tex.Crim. 581, 99 S.W. 996 (1907). However, we find that *appellant's* motion for new trial was insufficient to overcome the presumption created by Art. 44.24(a).

[8] Appellant's contention that the indictment was never read to the jury is unsupported by his motion for new trial. The motion for new trial contains an affidavit of the court reporter stating that the indictment was read to appellant during his arraignment, outside the presence of the jury. Appellant filed a motion with the court to arraign him outside the presence of the jury, before the trial. There is no dispute that appellant requested to be and was arraigned outside the presence of the jury. Thus, the court reporter's affidavit contains only facts that are uncontested. The issue the affidavit should have addressed is whether the indictment was ever read *to the jury* and a plea taken *before the jury*. These facts, or their absence, were never mentioned in the affidavit of the court reporter; consequently, an affirmative showing in the record contrary to the presumption of Art. 44.24(a) has not been made. Therefore, *Peltier*, supra, *Theriot*, supra, and *Essary*, supra, are not controlling. Additionally, the judgment of the court and the docket sheet both state the indictment was *read to the jury* and a *plea was taken before the jury*. Finally, appellant's attorney had an opportunity to review the record and made no objection concerning the judgment or docket sheet. His claim now is insufficient to overcome the presumption created by the judgment.

Ward v. State, 168 Tex.Crim. 493, 329 S.W.2d 887 (1959); *Ward v. State*, 160 Tex. Crim. 328, 268 S.W.2d 669 (1954). Ground of error number two is overruled.

[9] Appellant's third ground of error is that all evidence seised from a warrantless search of a 1981 pickup truck is not justified by any exception to the warrant requirements and should have been suppressed. The State's response is that a valid consent to search the truck was given by appellant's supervisor, who had control over the vehicle. Third persons can consent to searches if they have control over and authority to use the premises being searched. *Lowery v. State*, 499 S.W.2d 160, at 165 (Tex.Cr.App.1973). We see no reason why such a rule for homes and buildings should not apply to automobiles as well. Therefore, if appellant's supervisor had authority and control over the pickup, then he had the power to consent to its search, regardless of its location.

[10] It is a question of fact whether the consenting person has a right to use or occupy a particular area, or automobile, and whether that right is sufficient to justify permitting a search. *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969); *Lowery*, supra, at 166. W.C. Stokes, appellant's supervisor, testified, outside the presence of the jury, that he had unconditional authority to assign or reassign trucks to all the tool pushers under his supervision, one of whom was appellant. This testimony was not controverted or impeached by appellant. Appellant's motion to suppress was then overruled and the testimony was repeated before the jury.

We find the degree of control exhibited by appellant's supervisor sufficient enough to establish a valid consent, dispensing then with the requirement of a search warrant. Appellant's third ground of error is overruled.

[11] Appellant's fourth ground of error is that the trial court erred by not excluding evidence obtained as a result of his arrest, specifically evidence concerning his lineup. He claims the affidavit upon which the warrant was obtained made only legal conclusions and did not state facts sufficient to justify a finding of probable cause, and was invalid. Therefore, all evidence which was obtained as a result of this arrest was erroneously admitted at trial.

We need not consider the validity of appellant's complaint because the affidavit complained of is not in the record before us. It is incumbent upon an appellant to insure that an affidavit complained of is properly included in the appellate record. *Dusek v. State*, 467 S.W.2d 270 (Tex.Cr. App.1971); *Haynes v. State*, 468 S.W.2d 375, at 377 (Tex.Cr.App.1971), cert. den. 405 U.S. 956, 92 S.Ct. 1180, 31 L.Ed.2d 233 (1972). Appellant's fourth ground of error is overruled.

[12] Appellant, in his fifth ground of error, alleges that the trial court erred in allowing testimony of a police officer to bolster the testimony of another witness *before* that witness had testified and had been impeached. Salina Kay Elms, the only eye-witness to the crime, identified the appellant in a post-arrest lineup, and also at the trial. At appellant's trial, before Salina testified, the police officer who conducted the lineup testified that Salina had identified appellant in the lineup. Appellant's attorney had filed a pre-trial motion to suppress an illegal identification which included an objection to the introduction of testimony that would be cumulative and bolster the testimony of the sole identifying witness, Salina Kay Elms. This motion was overruled and a hearing denied, to which appellant's attorney excepted.

Appellant claims *Lyons v. State*, 388 S.W.2d 950 (Tex.Cr.App.1965), mandates a reversal because there was no way to impeach Salina Kay Elms before she testified. *Lyons*, supra, stands for the proposition that while a witness who has identified his assailant at trial may also testify as to an identification at a lineup, but other witnesses may not bolster that testimony until it has been impeached. This would be controlling in this case but for the exception in *Fraser v. State*, 473 S.W.2d 479, 482 (Tex.

Cr.App.1971), and followed in *Franklin v. State*, 606 S.W.2d 816, 823–4 (Tex.Cr.App. 1978), (rev'd on rehearing on other grounds, 1979), holding that if bolstering testimony is erroneously admitted in the trial court before the identifying witness is impeached, the error is cured by impeaching or attempting to impeach the identifying witness, even if this is subsequent to the bolstering testimony.

Appellant sought to impeach Salina Kay Elms when she took the stand by pointing out discrepancies between her direct testimony and prior statements she made concerning appellant's description. We hold this cross-examination to be within the exception in *Fruson*, supra, and accordingly overrule appellant's fifth ground of error.

[13–15] Appellant's sixth ground of error is that the trial court erred by allowing the prosecuting attorney to question a witness from a transcript of a tape recording when the best evidence was the tape recording itself. The State prosecutor said he had no objection to playing the tape, however, neither the tape nor the transcript were offered into evidence by either appellant or the State. Appellant's attorney had access to the tape. The best evidence rule does not apply when the item in question is not admitted into evidence to prove its contents. See *Green v. State*, 617 S.W.2d 253 (Tex.Cr.App.1981). Additionally, the best evidence rule only applies to documents. *Henriksen v. State*, 500 S.W.2d 491, at 495 (Tex.Cr.App.1973). Appellant's contention is without merit.

[16] Appellant's seventh, eighth, ninth, tenth, and eleventh grounds of error concern the testimony of Detective Jerry Smith about oral statements made by appellant while in custody. Detective Smith, over objection, was allowed to testify during the punishment phase of appellant's trial about conversations he had with appellant concerning the disappearance, death, and recovery of the body of one Blanca Arreola.

Appellant's seventh ground is that this testimony came as a total surprise and unfairly prejudiced his right to a fair and impartial jury trial in violation of Art. 39.14, V.A.C.C.P., the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Sec. 10 of the Texas Constitution. We find appellant's claim to be unsupported by the record.

Detective Smith testified that he had been issued a subpoena duces tecum ordering him to appear on the day of appellant's trial and bring the complete file of the Odessa Police Department concerning the death of Blanca Arreola. He further stated that the subpoena duces tecum was obtained by the defense, but that appellant's attorney had never asked to see the file. We fail to see how appellant was surprised. Additionally, in *Milton v. State*, 599 S.W.2d 824 (Tex.Cr.App.1980), (on motion for rehearing, 620 S.W.2d 115 (Tex.Cr.App.1980)), cert. den. 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981), reh. den. 453 U.S. 923, 101 S.Ct. 3160, 69 L.Ed.2d 1006 (1981), we held that notice was not required to be given to the defendant before evidence of extraneous offenses are introduced. Ground of error seven is overruled.

[17] Ground eight is that the prosecuting attorney affirmatively represented to the Court that no such oral statements were made by appellant and none would be used by the prosecution, in violation of Articles 39.14 and 38.22, V.A.C.C.P., the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 10 of the Texas Constitution.

Ground nine is that the State did not show compliance with Article 38.22, V.A.C.C.P., said statements not being reduced to writing nor electronically recorded, and made while appellant was in custody.

Ground ten is the same as ground nine but adds that the statements were made while appellant was represented by counsel.

[18] Ground of error eleven is that there was no showing by the State of a voluntary waiver by the appellant under Art. 38.22, Sec. 2(a) [sic]. Before Detective

Smith testified at the punishment phase, appellant made the following objection:

"MR. POSTEL: [Prosecuting attorney] We call Jerry Smith.

"MR. WILLIAMSON: [Defense attorney] Your Honor, I have just been advised by the prosecutors as to what this proposed testimony of this witness is going to be and I want to object at this time as being inadmissible evidence of extraneous offenses and it is not admissible at this stage of the trial and we object to it on that ground.

"THE COURT: The objection is overruled.

"MR. WILLIAMSON: Note my exception. May I have a continuing objection to everything this witness says, Your Honor, without waiving my objection?

"THE COURT: Yes. You may have a running objection."

This objection is insufficient to preserve the alleged errors appellant now complains of. An error presented on appeal must be the same as the objection raised at trial. *Vanderbilt v. State*, 629 S.W.2d 709 (Tex.Cr.App.1981), cert. den. 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 169 (1982). *Nelson v. State*, 607 S.W.2d 554 (Tex.Cr.App.1980). We find grounds eight through eleven to be without merit.

[19] Appellant, in his twelfth ground of error, alleges that the testimony of Detective Smith, during punishment, was admitted in violation of Art. 37.07 and Art. 37.071, V.A.C.C.P. Although this ground of error is properly preserved by the objection which forms the basis for grounds seven through eleven, supra, it is not a meritorious contention. Evidence of unadjudicated offenses is admissible at the punishment phase of a capital murder case. *Rumbaugh v. State*, 629 S.W.2d 747 (Tex.Cr.App.1982); *Williams v. State*, 622 S.W.2d 116 (Tex.Cr.App.1981). Ground of error twelve is overruled.

[20] Ground of error thirteen is that the trial court commented upon the weight of the evidence when he was addressing the entire jury panel by stating "His guilt is established beyond a reasonable doubt", in violation of Article 38.05, V.A.C.C.P. To evaluate the merit of appellant's claim, we must first determine if the statement complained of was such as would be reasonably calculated to injure his rights. See *Sharpe v. State*, 648 S.W.2d 705 (Tex.Cr.App.1983). The preceding sentence and the words complained of read as follows:

"THE COURT: Now, under the law, every person is presumed to be innocent until proven guilty by legal and competent evidence presented to you here during the trial and under the direction of the Court. His guilt is established beyond a reasonable doubt. ..."

Two pages later, the judge stated:

"... As I have stated, it is necessary and mandatory that the evidence presented to the Jury, satisfy the Jury beyond a reasonable doubt the guilt of the defendant and the Jury, after having retired to the Jury room, and after having been given the Court's instructions on the law and before they retire to deliberate, *if the Jury should have a reasonable doubt as to the defendant's guilt, after their deliberations, it will be their obligation and duty to find the defendant not guilty.* If the Jury should be satisfied beyond a reasonable doubt of the defendant's guilt, it will be their obligation and duty to find the defendant guilty." (Emphasis added)

We find that the statement complained of was taken out of context by the appellant. The statement, taken with the rest of the instructions, cannot be said to have injured appellant's right to an impartial trial. Additionally, since appellant made no objection at the time the statement was made, nothing was presented for review. *Minor v. State*, 469 S.W.2d 579 (Tex.Cr.App.1971); *Hovila v. State*, 562 S.W.2d 243, at 249 (Tex.Cr.App.1978), cert. den. 439 U.S. 1135, 99 S.Ct. 1058, 59 L.Ed.2d 97 (1979); *Sharpe*, supra; *Downey v. State*, 505 S.W.2d 907 (Tex.Cr.App.1974). Ground thirteen is overruled.

Appellant's fourteenth ground of error is a denial of a representative jury of his

peers guaranteed by the Sixth Amendment to the United States Constitution, Article I, Sections 10 and 15 of the Texas Constitution, and Article 35.16, V.A.C.C.P. Specifically, appellant claims that the trial court erroneously excused Aurora Tobar based on the state's challenge for cause. Appellant claims that Ms. Tobar's voir dire examination did not show an unequivocal ability to follow the law, but only her general opposition to the death penalty. Therefore, Ms. Tobar was not disqualified under the standard set out by the United States Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Further, appellant submits that excluding even one juror improperly is grounds for a reversal, citing *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

[21] *Witherspoon* is no longer the standard for determining whether a challenge for cause by the State has been improperly granted. See *Wainwright v. Witt*, — U.S. —, 105 S.Ct. 844, 83 L.Ed.2d 84 (1985). In *Witt*, the United States Supreme Court held that the proper standard to be used in disqualifying jurors in death penalty cases was whether a juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. This standard dispenses with the automatic decision-making requirement set out in *Witherspoon*. Further, there is no requirement that a juror's bias be proved with unmistakeable clarity. *Witt*, supra, 105 S.Ct., at 852.

The Court held that this new test, taken from *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), was preferable to the *Witherspoon* standard for three reasons. First, the language in *Witherspoon* was no longer applicable to the duties of present day capital sentencing juries because in *Witherspoon*, the jury was vested with an unlimited discretion in sentencing. Whereas, at the time *Adams*, supra, was handed down, sentencing juries could not be vested with such discretion. See *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Second, the Court held the standard set out in *Witherspoon* was dicta. Finally, the *Adams* standard was proper because it was in accord with traditional reasons for excluding jurors and with the circumstances under which such determinations are made. *Witt*, supra, 105 S.Ct. at 851.

In the present case, after some questioning of Ms. Tobar, the State made a challenge against her for cause. The trial judge, after stating he felt Ms. Tobar was not disqualified, allowed the State and defense attorneys to continue their questioning.

[22] Then, the following testimony occurred:

"By Mr. Fostel: [Prosecuting Attorney]

"Q. Let me start all over again. You told me on two or three occasions that you felt like you would automatically vote against the death penalty. Do you now feel like you—would you or would you not automatically be opposed to the death penalty regardless of the facts?

"A. I would be opposed.

"Q. I believe you told me that it was the way that you personally feel, plus your religion. Is that correct?

"A. Yes.

"Q. I believe you told me that it is something you had felt for a long time. Is that still the way you feel?

"A. Yes.

"Q. I asked you awhile ago if I could assume that because of your personal convictions and personal feelings in opposition to the death penalty, do you feel that under no circumstances would you be able to ever be a party to voting for the death penalty regardless of the case. I believe you told me awhile ago that you didn't feel like you could.

"A. I wouldn't.

"Q. You don't feel like you could ever be a party to a proceeding where the death penalty could result?

"A. No.

"Q. You could not?

"A. No.

"Q. In other words, under no circumstances would you personally ever vote for the death penalty. Is that right?

"A. That's right.

"Q. Do you feel like your feelings are such that it would affect your deliberations as a Juror if you were selected in this case where the death penalty is one of the possibilities?

"A. I don't think I could.

"Q. Well, then, I assume that you couldn't take an oath then that you would be required to take, if the Court required you to take it, that your feeling in opposition to the death penalty would not affect your voting in any way. Is that true?

"A. That's true.

"Q. Is your feeling so firm that you would automatically vote against the death penalty?

"A. Yes.

"Q. Even knowing that you are not going to be saying death or life but rather answering these questions yes or no, but knowing that if you answer them all yes, that the death penalty would be imposed. You don't feel like you could ever do that?

"A. No.

"Q. I appreciate your honesty and straightforwardness. Now, one other thing. Do you feel like, if you were on the Jury, that your convictions are so strong that you wouldn't let anyone talk you out of your feelings against the death penalty?

"A. No, I wouldn't let them.

"Q. You don't believe you could ever do it, regardless of the facts, you would be opposed to the death penalty?

"A. Yes.

"MR. FOSTEL: Your Honor, I renew my challenge.

By Mr. Williamson [Defense attorney]:

"Q. Mrs. Tobar, our law is specifically designed to take the decision out of the Jury's hand as to whether or not the death penalty should be involved. That's the reason the legislature passed the capital murder statute and it is the way it is now, so that all you would have to do is answer those questions. If this were a lesser crime, if this were a theft case, and these questions were put to you, you could answer those questions, could you not?

"A. If it was something small, yes.

"Q. As I said earlier, the Court would be the one to impose the sentence on the defendant. Your answers alone would not be the deciding factor. In other words, all twelve Jurors would have to answer those questions unanimously yes, in order for the death penalty to be imposed, but you could look at those special issues and answer those questions yes or no, could you not?

"A. I wouldn't.

"Q. Beg your pardon?

"A. I wouldn't. I don't think I would.

"MR. WILLIAMSON: Your Honor, I feel like the witness is qualified on the death penalty, based upon her earlier answers.

"THE COURT: You will be excused...."

The aforementioned testimony indicates that Ms. Tobar's views would substantially impair or prevent the performance of her duties as a juror. She was therefore properly excluded for cause under *Witt*, supra. In addition, we find Ms. Tobar was properly excluded under the former *Witherspoon* test. Ground of error fourteen is overruled.

[23] Grounds of error fifteen and eighteen are discussed together. Appellant's fifteenth ground of error concerns a failure to grant his challenge for cause of prospective juror W.F. Dixon, who had expressed an opinion that appellant was guilty of the offense charged. When the trial court failed to excuse for cause, appellant then had to use one of his peremptory challenges. Appellant did not use all of his peremptory challenges, but claims the rule of law in *Sifford v. State*, 505 S.W.2d 866

(Tex.Cr.App.1974); *Payton v. State*, 572 S.W.2d 677 (Tex.Cr.App.1978); and *Hernandez v. State*, 563 S.W.2d 947 (Tex.Cr.App.1978) (all cited by appellant), should not apply because of the mistake the court made in ground of error eighteen.

Ground of error eighteen is the failure to grant extra peremptory challenges for alternate jurors. Appellant made two requests for additional peremptory challenges pursuant to Art. 35.15(d), V.A.C.C.P. Article 35.15(d) reads as follows:

"(d) The State and the defendant shall each be entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled and two peremptory challenges if three or four alternate jurors are to be impaneled. The additional peremptory challenges provided by this subsection may be used against an alternate juror only, and the other peremptory challenges allowed by law may not be used against an alternate juror."

Appellant's first request for additional peremptory challenges was at a time when there was still one juror to be selected and prior to any questioning of alternate jurors. At that time, appellant still had four peremptory challenges left. The court refrained from ruling on appellant's request until such time as appellant had exhausted all of his challenges. Appellant claims that since he was not then afforded extra strikes, he had to plan to save some of his remaining strikes because it was his impression that the judge was not going to give him additional strikes for the alternate jurors, in accordance with Art. 35.15(d).

When appellant made his second request, the only jurors to be selected were the alternates. At that time, the court notified appellant that he had four strikes left. It is appellant's contention that had he made a strike (with one of the four remaining), the court *might* then have refused to allow extra strikes under Art. 35.15(d).

We concede that the trial court erred in the number of strikes allowed in selecting alternate jurors but fail to see how appellant sustained any harm by receiving more peremptory strikes than he should have. Had the State been granted extra strikes or had appellant been denied the use of his four remaining strikes and denied additional, alternate strikes, to use for the alternate jurors are issues not before us. Appellant cannot sustain his burden of showing error by simply stating his impression of what the court may have done had he completely run out of peremptory challenges. To show harm in this situation, the accused must first at some point run out of challenges, have requested and been denied addional challenges, and then show that he was harmed by being forced to take a later, prospective juror whom he would have struck, but was unable to because he did not have the sufficient number of strikes to which he was entitled, see *Hernandez v. State*, 563 S.W.2d 947 (Tex.Cr.App.1978). Appellant has not met this burden. Grounds of error fifteen and eighteen are overruled.

Ground of error seventeen is the failure to excuse potential juror Levon Parker because he was biased, and appellant had to use another peremptory challenge. Appellant makes the same argument here as in ground of error fifteen and urges again the circumstances of ground eighteen should create an exception to the requirement of using all of his challenges. For the same reason as stated in grounds fifteen and eighteen, ground seventeen is overruled.

Appellant's sixteenth ground of error is the improper sua sponte exclusion of a prospective juror, Edmundo Vargas, by the trial court. Appellant claims the excusal can only be *sua sponte* by the court for an absolute disqualification, citing *Pearce v. State*, 513 S.W.2d 539 (Tex.Cr.App.1974), and *Chambers v. State*, 568 S.W.2d 313 (Tex.Cr.App.1978), cert. den. 440 U.S. 928, 99 S.Ct. 1264, 59 L.Ed.2d 484 (1979). Appellant correctly states the rule that when the court erroneously discharges a qualified prospective juror, under *Payton v. State*, 572 S.W.2d 677 (Tex.Cr.App.1978), the showing for reversal is the same as when a challenge by the State is mistakenly granted, but there is no harm if the State has leftover peremptory challenges. *Payton*, supra; *Pearce*, supra; *Culley v. State*, 505 S.W.2d 567 (Tex.Cr.App.1974). Appellant is also correct that the rule in *Payton* has no application in a capital case, because peremptory strikes are exercised after each prospective juror is questioned, as opposed to waiting until after the entire panel is examined in a non-capital case. See *Grijalva v. State*, 614 S.W.2d 420 (Tex.Cr.App.1981) (overruling *Chambers*, supra).

[24] However, we find that the facts of this case do not show a sua sponte disqualification by the trial court, as appellant alleges. The following occurred during the voir dire of prospective juror Edmundo Vargas:

By Mr. Williamson [defense attorney]

"Q. Okay. And if he is guilty on the issue of capital murder, would you automatically impose the death sentence?

"A. Yes.

"Q. Without listening, in any way, to the testimony. If you find he is guilty of the offense of capital murder, let me go back to the chart, if you find he is guilty of the offense of capital murder, you are going to give him the death penalty?

"A. If he is guilty, yes.

"MR. WILLIAMSON: Your Honor, I submit the Juror should be challenged for cause.

EXAMINATION,

By Mr. Fostel [State's attorney]:

"Q. You wouldn't automatically give him the death penalty, would you? You would consider everything in the punishment stage, wouldn't you?

"A. I would have to hear everything.

"Q. You would consider a life sentence as well as the death penalty?

"A. Yes, sir.

EXAMINATION,

By Mr. Williamson:

"Q. Let's back up. What have you heard about this case, Mr. Vargas?

"A. Just what I read in the Ozona Stockman.

"Q. Okay. Can you tell me what you read in there?

"A. That—Well, that he had—they were going to try him here for the murder of that woman. That's all I read.

"...

"Q. Let me ask you this. Suppose you were the person on trial here for capital murder and there was a potential Juror who had the same frame of mind as you do now, would you want that person on your Jury?

"A. No.

"Q. Why not?

"A. I don't know. If I do something like that, it would be up to the Jury.

"Q. That's what I'm saying. If you were sitting right here where this man is sitting and you were charged with a capital murder, would you want a potential Juror on your case with you knowing what your frame of mind is right now?

"A. About him? I wouldn't know.

"Q. Well now, if you were sitting beside me and we were trying you for capital murder, would you want a Juror like you think right now, would you lean over and say let's take him as a Juror?

"A. No.

"Q. You wouldn't want that?

"A. No.

"THE COURT: I'm going to honor the defense attorney's request that this Juror be excused, from your earlier questions. I think the answers you are getting now—I anticipate it again. He said it twice that he would not pick a Juror with his frame of mind.

"MR. WILLIAMSON: I withdraw my earlier request.

"THE COURT: I'm going to honor your earlier request that he be excused for cause. Mr. Vargas, you are excused from this Jury. You will not have to serve. I'm going to ask you to please not discuss this case with anyone until after it is over. I appreciate your being

here and your time and your willingness to serve.

"MR. WILLIAMSON: I would like for the Court to note my exception. I withdrew my earlier challenge for cause and I submit that the Court, in excusing this Juror, at this point, would be violative of this man's sixth and fourteenth Amendment Rights to a fair and impartial Jury.

"THE COURT: Do you have any response, Mr. Fostel?

"MR. FOSTEL: No, Your Honor.

"THE COURT: You are excused."

Appellant cannot challenge a juror, get a ruling, *then* withdraw his challenge, and complain of error on the judge's part. Ground sixteen is overruled.

Appellant's nineteenth ground of error is that the indictment in this case did not properly apprise him of the nature and cause of the accusation. Specifically, he points out that the three special issues of Art. 37.071(b), V.A.C.C.P.,[2] were not included in the indictment, and therefore the state did not plead in the indictment all the elements necessary to be proven to allow the sentence of death to be imposed.

Appellant cites *Lindsay v. State*, 586 S.W.2d 570 (Tex.Cr.App.1979) which held an indictment invalid because the allegation "capital murder for remuneration and the promise of remuneration" failed to satisfy the requirement that everything necessary to be proved should be stated in the indictment. See Art. 21.03, V.A.C.C.P.

[25] Appellant is correct in his assertion that everything necessary to be proven to sustain a conviction *in the guilt/innocence phase* must be alleged in an indictment. However, the special issues of Art. 37.071(b), supra, are not an element of the offense of capital murder; Art. 37.071 relates only to punishment.

V.T.C.A., Penal Code Sec. 19.03 states what needs to be proven to convict a person of capital murder. Section 19.03 reads in relevant part:

"(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and

. . . . . .

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping . . ."

V.T.C.A., Penal Code Sec. 19.02(a)(1) reads in relevant part:

"(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual; . . ."

V.T.C.A., Penal Code Sec. 20.02 reads in relevant part:

"(a) A person commits an offense if he intentionally or knowingly abducts another person. . . ."

The indictment in this case reads in relevant part:

". . . MICHAEL EUGENE SHARP . . . did then and there intentionally and knowingly cause the death of an individual, Brenda Kay Broadway, by stabbing the said Brenda Kay Broadway with a knife, and the said MICHAEL EUGENE SHARP did then and there intentionally cause the death of the said Brenda Kay Broadway in the course of committing the offense of kidnapping, to-wit: MICHAEL EUGENE SHARP did then and there intentionally and knowingly abduct the said Brenda Kay Broadway by threatening to use deadly force on the said Brenda Kay Broadway, without the consent of the said Brenda Kay Broadway and with intent to prevent the liberation of the said Brenda Kay Broadway, . . ."

[26] While the indictment must allege everything necessary to be proven to sustain a conviction, it need not state more. The indictment is sufficient.

Ground of error nineteen is overruled.

The judgment of the trial court is affirmed.

MILLER, J., concurs in the result only in ground of error sixteen, but otherwise joins the opinion of the majority.

CLINTON, J., dissents.

TEAGUE, Judge, dissenting.

As a general proposition, based upon what this Court has stated and held in the past, it is true as the majority opinion states, that "Evidence of unadjudicated offenses is admissible at the punishment phase of a capital murder case." However, simply making such a conclusory statement is not always sufficient to dispose of a contention that such should not have been admitted into evidence at the punishment stage of a capital murder trial.

My understanding of the record in this cause is that to establish the unadjudicated offense of the murder of Blanca Arreola, the State relied solely upon what the appellant, who was then in custody and represented by counsel, had told a Detective Smith concerning Arreola's murder, her burial, and the place where her body was buried. Notwithstanding these incriminating statements, by the record before us, the appellant to this day has not been charged with the murder of Arreola.

Appellant asserts, inter alia, that because the prosecuting attorney affirmatively represented to the trial judge during the pretrial phase of this cause that no such oral statements were made by the appellant, and thus none would be used by the prosecuting attorney during the trial of this cause, his subsequent use of such statements over objection constitutes reversible error.

The majority opinion, in extremely casual fashion, disposes of the appellant's contentions that the statements should not have been admitted into evidence, because, inter alia, there was no showing of a compliance with the then provisions of Art. 38.22, V.A.C.C.P., by simply holding that his counsel's trial objection was insufficient to preserve the error. Had what occurred in this cause not occurred, I might agree.

Appellant's counsel acknowledges the fact he did not properly object in the trial court, but explains to this Court in satisfactory fashion, to me at least, that this occurred because the prosecuting attorney had affirmatively stated during pretrial that the State would not seek to offer any oral statements of the appellant during his trial. In other words, the reason why the appellant's attorney did not sufficiently articulate his objection at trial was because he got sandbagged by the prosecuting attorney's false representation. Interestingly, in its appellate brief, the State does not even attempt to take issue with what the appellant's attorney's asserts, nor does it seek to justify the actions of the prosecuting attorney.

Had the appellant's attorney not got sandbagged in the trial court by the prosecuting attorney, I am confident that he would have more intelligently expressed his objections why the statements that the appellant made to Smith were inadmissible.

Based upon this record, it is obvious to me that the statements that appellant made to Smith are, under Art. 38.22, supra, inadmissible as a matter of law. This, of course, might explain why the prosecuting attorney represented that he was not going to introduce any such statements into evi-

2. Art. 37.071 reads as follows:

Procedure in Capital Case

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. . . .

"(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonably expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

"(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

". . . .

"(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. . . ."

dence at the appellant's trial. See and compare *King* v. *State*, 657 S.W.2d 109 (Tex.Cr. App.1983), with the provisions of Art. 38.22, supra, as worded at the time the statements were obtained from the appellant. Of course, the prosecuting attorney was presumed to have been aware that, under the existing law at the time, the admissibility of evidence that is offered pursuant to Art. 37.071, supra, is governed by exclusionary rules of evidence. *King*, supra, at 111.

If this Court is willing to sweep the appellant's contentions under the rug labeled "The objection is insufficient to preserve the alleged errors appellant now complains of," it should at least be willing to remand this cause to the trial court in order to hold a hearing on the fundamental error issue whether the appellant was denied and deprived of the effective assistance of counsel at his trial.

I would review the error in the interest of justice or at least remand the cause to the trial court for a hearing to be held on the issue whether the appellant was deprived of the effective assistance of counsel at his trial. Because the majority of this Court refuses to do either, I must dissent.

MICHAEL EUGENE SHARP, Appellant

NO. 69,301 V. - - - Appeal from CROCKETT County

THE STATE OF TEXAS, Appellee

O R D E R

This Court affirmed Appellant's capital murder conviction and sentence of death on direct appeal. Sharp v. State, 707 S.W.2d 611 (Tex.Cr.App. 1986). This Court's mandate issued on October 10, 1986. No petition for writ of certiorari to the United States Supreme Court was filed. The trial court has scheduled Appellant's execution to be carried out on or before sunrise, March 24, 1988.

Appellant has filed a motion to recall the mandate and stay his execution. This Court is of the opinion that the motion should be granted. Therefore, it is ordered that the mandate in our Cause No. 69,301, be recalled until a petition for writ of certiorari is filed in the United States Supreme Court, or until the expiration of sixty (60) days, whichever comes first. Additionally, it is the order of the Court of Criminal Appeals that Appellant's motion for stay of execution currently scheduled for March 24, 1988, is granted.

IT IS SO ORDERED THIS THE 15TH DAY OF MARCH, 1988.

PER CURIAM

En Banc

Do Not Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

EX PARTE MICHAEL EUGENE SHARP §
(DEATH ROW INMATE NO. 740,) §
§ NO. _____
PETITIONER §

AFFIDAVIT OF STEVEN C. JAMES

Steven C. James came before me on March 13, 1988 and, being first duly sworn, did state as follows:

1. I am an attorney licensed in the State of Texas since May, 1979. My State Bar No. is 10551500. I am also admitted to practice before the United States Supreme Court, the Fifth Circuit Court of Appeals and the United States District Courts for the Northern and Western Districts of Texas. I first practiced law for 6 1/2 years with Mesa Petroleum Co. (run by T. Boone Pickens) in its Amarillo and Midland, Texas offices. I have been with the law firm of Kemp, Smith, Duncan & Hammond, P.C. since February 6, 1986 and am currently a Partner/Shareholder with the firm. I run the firm's one-attorney office in Midland, Texas. The main office of the firm is in El Paso, Texas. I am in the Trial Department of the firm and I carry a full docket of civil trial matters for a number of clients doing business in Midland, Texas. I also have two cases that are in the early stages of appeal by opposing counsel to the Fifth Circuit Court of Appeals. I have never handled a criminal matter before. My only exposure to criminal law has been classes taken while attending The University of Texas School of Law in Austin, Texas from September, 1976 to May, 1979. Another Partner/Shareholder in the firm, Ms. Mitzi Turner, has agreed to assist me in preparing the petition for certiorari and other post-conviction pleadings with regard to the case of Michael Eugene Sharp. Ms. Turner is also in the Trial Department. She carries a tremendous load of cases for which she has the primarily responsibility.

2. In mid-November, 1987, I agreed to represent Mr. Michael Eugene Sharp in post-conviction appeals of his case, Sharp v. State. Mr. Sharp's case was brought to my attention by The University of Texas Capital Punishment Clinic. I accepted Mr. Sharp's case and am representing him pro bono.

3. Following my acceptance of Mr. Sharp's case, I awaited receipt of the record which, as I understood from representatives of the Clinic, was going to be obtained for me from the counsel who had handled the appeal to the Texas Court of Criminal Appeals on behalf of Mr. Sharp. For whatever reasons, the efforts of the Clinic did not result in my obtaining the record.

4. On January 10, 1988, I was contacted through a mutual friend by the trial counsel for Mr. Sharp, Mr. Glen Williamson, who informed me that a sentencing hearing was to be had for Mr. Sharp in Ozona, Texas on January 11, 1988. At that hearing, the execution date of 12:01 a.m. on March 24, 1988 was set for Mr.

Sharp. At that hearing I requested that the trial Court make available to me the entire record for copying. The trial Court and the 112th Judicial District Clerk agreed to make the record available, but would not permit me to check out the record and have it copied. I left Ozona, Texas that day with the impression that the District Clerk would copy the record and forward it to me in the mail. When I did not receive the record in the mail, I contacted the District Clerk a few days later and was then advised that each page of the record would cost $1.00 for copying whether or not I copied it on site in Ozona, or the District Clerk copied it and mailed it to me. The voir dire and trial in this case had taken three weeks. That time period was in addition to other pre-trial motions and hearings. I expected the transcript to be thousands of pages long. Therefore, $1.00 per page in this pro bono case was a significant charge. Fortunately, after several additional phone calls over the next few days, the District Clerk graciously allowed me to send a person to Ozona, Texas to copy the record with no charge. However, it turned out that the District Clerk only had a copy of Volume 2, pages 522-622 available for copying. This did not contain any of the voir dire proceedings or any of the trial testimony. Simply put, her file did not contain anywhere near a complete copy of the record. Her file did have a few additional matters beyond the transcript, such as this Court's opinion and the January 11, 1988 Sentence of Death. My personnel obtained a copy of everything that the District Clerk had available.

5. Mr. Williamson was kind enough to furnish a copy of his

initial legal brief to me at the January 11, 1988 hearing. He had recently moved his law practice from Andrews, Texas to Santa Fe, New Mexico and was busy studying for the State Bar Exam in New Mexico. He had taken all of his legal files with him and placed them in boxes and stored them. After the hearing, Mr. Williamson went back to Santa Fe and went through some of his boxes. Several weeks after the sentencing hearing, Mr. Williamson personally delivered to me several volumes of what appear to be a copy of significant portions of the voir dire and trial transcript and pre-trial proceedings. After I had an opportunity to review what Mr. Williamson had furnished, I requested that he go through additional boxes and try to furnish additional information to me. He has done so. For example, he has been able to furnish to me the legal brief filed by the prosecutor with the Court of Criminal Appeals and the supplemental legal brief that Mr. Williamson filed on behalf of Mr. Sharp. Unfortunately, the copy of the record that is in my possession is still incomplete in major respects.

6. In recent weeks, I have contacted personnel in the Clerk's office of the Court of Criminal Appeals in an effort to obtain access to the Court's copy of the record. Here again, I have not been permitted to simply check out the record and copy it. I have to copy it on site in Austin, Texas. I have now made arrangements to send a person from my office to Austin, Texas, at my firm's expense, to compare the portions of the record presently in my possession with those in the possession of the Court of Criminal Appeals. This comparison will be done

on March 14, 1988.

7. Due to the delay in obtaining the portions of the record that I now have, I have had only a limited opportunity to review them and begin preparing a petition to the United States Supreme Court. Obviously, I have not had any opportunity to review those portions of the trial record which I have been unable to obtain to this point. Quite a bit of work has been accomplished in this case, however, despite the demands of other cases and appeals and despite the lack of the record complete. Several conversations have been had about Mr. Sharp's case with personnel at The University of Texas Capital Punishment Clinic. Mr. Sharp has been visited twice and I have interviewed his Mother. I have obtained from her tapes of certain pre-trial interviews which will be reviewed. The Clinic has furnished a manual concerning death penalty cases which has been reviewed and huge portions of the trial and pre-trial proceedings have been read. All of the appellate briefs have been read and initial research has begun in an effort to develop the petition for the United States Supreme Court.

8. Some of the arguments that I hope to be able to develop for the petition to the United States Supreme Court are set out in paragraph 11 of the Emergency Application to which this Affidavit is attached. In my professional opinion, as a practicing attorney for almost nine years, I believe that those arguments have merit and are entitled to a full presentation to the United States Supreme Court. The subsequent investigation and research may, of course, determine that some of the

arguments are more meritorious than others and may result in the discovery of additional issues that merit review by the United States Supreme Court. Additional time is urgently needed to obtain, review and evaluate the entire record in this case and to do the research on the issues raised by that record.

9. I am over 21 years of age, have never been convicted of a crime, and am fully competent to make this Affidavit. The Affidavit is based upon my personal knowledge of the matters stated hereinabove. Further Affiant sayeth not.

Steven C. James
STEVEN C. JAMES, Affiant

5078SJ

STATE OF TEXAS §
COUNTY OF MIDLAND §

SWORN TO AND SUBSCRIBED BEFORE ME this 13th day of March, 1988 by Steven C. James, Affiant.

My Commission Expires:
11/10/91

Hillary Hellinghausen
Hillary Hellinghausen, Notary Public
in and for the State of Texas

APPENDIX D

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) If a defendant is convicted of an offense under Section 19.03(a)(6), Penal Code, the court shall submit the three issues under Subsection (b) of this article only with regard to the conduct of the defendant in murdering the deceased individual first named in the indictment.

(g) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Subsec. (e) amended by Acts 1981, 67th Leg., p. 2673, ch. 725, § 1, eff. Aug. 31, 1981. Amended by Acts 1985, 69th Leg., ch. 44, § 2, eff. Sept. 1, 1985.